

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Griffin Sherbert	Team: Squad #7	CCRB Case #: 201908416	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Saturday, 09/21/2019 10:50 PM, Sunday, 09/22/2019 4:00 PM	Location of Incident: 1.) In front of § 87(2)(b) 2.) Inside of 77th Precinct Stationhouse	Precinct: 77	18 Mo. SOL 3/21/2021	EO SOL 11/5/2021	
Date/Time CV Reported Mon, 09/23/2019 4:01 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 09/23/2019 4:01 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. SGT Denis Fitzgerald	03038	952735	077 PCT
2. POM Christian Lopez	24864	955083	077 PCT
3. POM Alex Viera	14168	945080	077 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Kevin Hernandez	07459	966620	077 PCT
2. SGT Kevin Mccarthy	03347	949290	083 DET

Officer(s)	Allegation	Investigator Recommendation
A.POM Christian Lopez	Abuse: On September 21, 2019, in front of § 87(2)(b) in Brooklyn, Police Officer Christian Lopez frisked § 87(2)(b)	
B.POM Alex Viera	Abuse: On September 21, 2019, in front of § 87(2)(b) in Brooklyn, Police Officer Alex Viera frisked § 87(2)(b)	
C.POM Alex Viera	Abuse: On September 21, 2019, in front of § 87(2)(b) in Brooklyn, Police Officer Alex Viera searched the vehicle in which § 87(2)(b) was an occupant.	
D.SGT Denis Fitzgerald	Abuse: On September 22, 2019, inside of the 77th Precinct stationhouse in Brooklyn, Sergeant Denis Fitzgerald threatened to arrest § 87(2)(b)	

### Case Summary

On September 23, 2019, § 87(2)(b) called the CCRB and filed the following complaint.

On September 21, 2019, at approximately 10:50 p.m., § 87(2)(b) and his friend, § 87(2)(b) were driving in his vehicle when they were pulled over by Police Officer Christian Lopez and Police Officer Alex Viera of the 77<sup>th</sup> Precinct, in an unmarked RMP, in the vicinity of § 87(2)(b) in Brooklyn. PO Lopez told § 87(2)(b) that he pulled him over for failing to signal and § 87(2)(b) asserted that he did signal. PO Lopez told § 87(2)(b) that his vehicle smelled like marijuana, and ordered him and § 87(2)(b) to exit. After exiting, PO Lopez frisked § 87(2)(b) while PO Viera frisked § 87(2)(b) and after, PO Viera searched the passenger compartment of § 87(2)(b)'s vehicle and recovered a bag of marijuana therein (**Allegation A, B, and C: Abuse of Authority-Frisk/Vehicle Search, § 87(2)(g)**). § 87(2)(b) and § 87(2)(b) reentered the vehicle, however, a few minutes later, PO Lopez returned, informed § 87(2)(b) he had an open warrant, handcuffed him, and transported him and his vehicle to the 77<sup>th</sup> Precinct stationhouse.

After his release the afternoon of September 22, 2019, § 87(2)(b) went back to the 77<sup>th</sup> Precinct stationhouse to retrieve his property and vehicle. § 87(2)(b) was upset that the officers had disabled his vehicle when it was returned to him, and requested to speak with a supervisor. Sergeant Denis Fitzgerald of the 77<sup>th</sup> Precinct, also refused to fix his vehicle, and threatened to arrest him if he did not leave the stationhouse (**Allegation D: Abuse of Authority-Threat of Arrest, § 87(2)(g)**).

The investigation obtained three Body-Worn Camera (“BWC”) videos from the officers involved, two of which captured the relevant portions of this incident (BR01-BR02).

### Findings and Recommendations

**Allegation A—Abuse of Authority: On September 21, 2019, in front of § 87(2)(b) in Brooklyn, Police Officer Christian Lopez frisked § 87(2)(b)**

**Allegation B—Abuse of Authority: On September 21, 2019, in front of § 87(2)(b) in Brooklyn, Police Officer Alex Viera frisked § 87(2)(b)**

**Allegation C—Abuse of Authority: On September 21, 2019, in front of § 87(2)(b) in Brooklyn, Police Officer Alex Viera searched the vehicle in which § 87(2)(b) was an occupant.**

§ 87(2)(b) stated (BR03) that on September 21, 2019, at approximately 10:50 p.m., he was driving with § 87(2)(b) in his gray BMW sedan, when they briefly stopped a corner store in the vicinity of Montgomery Street and Bedford Avenue in Brooklyn. After purchasing some food, they drove southbound on Bedford Avenue toward his home at § 87(2)(b). While on Bedford Avenue, § 87(2)(b) observed an unmarked RMP driving the opposite direction, make a U-turn, and then began to follow his vehicle.

At the intersection of Bedford Avenue and Sterling Street, § 87(2)(b) signaled to turn, and the unmarked RMP pulled his vehicle over. PO Lopez approached the driver side, and asked § 87(2)(b) to produce his license and registration, while PO Viera approached the passenger side. PO Lopez told § 87(2)(b) that he pulled him over for not signaling, and § 87(2)(b) disagreed. PO Lopez informed § 87(2)(b) that his vehicle smelled like marijuana. § 87(2)(b) provided his driver's license to PO Lopez, who ordered § 87(2)(b) and § 87(2)(b) to exit, and they complied.

PO Lopez patted down the exterior of § 87(2)(b) while PO Viera, patted down the exterior of § 87(2)(b). Afterward, the officers ordered § 87(2)(b) and § 87(2)(b) to stand at the back of his vehicle, and PO Viera searched the passenger compartment of his vehicle, wherein he recovered a small bag of marijuana that was in the cupholder of the driver side door.

A few minutes later, PO Lopez informed § 87(2)(b) that he had an open container warrant. PO Lopez handcuffed § 87(2)(b) placed him into the unmarked RMP, and he and his

vehicle were transported to the 77th Precinct stationhouse. § 87(2)(b) was held in the stationhouse overnight, issued three summonses for possession of marijuana, failing to signal, and driving without a license.

Although § 87(2)(b) was present for and a victim in this incident, he failed to appear for his scheduled interview and was ultimately uncooperative with the investigation.

Summons #§ 87(2)(b) (BR04), Summons #§ 87(2)(b) (BR05), and Summons #§ 87(2)(b) (BR06), were issued to § 87(2)(b) on September 21, 2019, by PO Lopez for unlawful possession of marijuana, failing to signal, and for unlicensed operation of a motor vehicle, respectively. The 77th Precinct Command Log (BR07) notes in addition to the above enumerated charges that PO Lopez arrested § 87(2)(b) for "ROW" (i.e. returned on warrant).

The investigation obtained three BWC videos belonging to PO Lopez, PO Viera, and Sergeant Kevin McCarthy of the 77th Precinct. PO Lopez's (BR01) and PO Viera's (BR02) BWC footage captured the relevant sections of this incident, as relates to the allegations, and as described below.

PO Lopez's BWC (BR01) begins with him driving, and at the 30-second mark when the audio begins, he exits the RMP and approaches § 87(2)(b)'s vehicle that he has stopped. PO Lopez asks § 87(2)(b) for his license and registration, and § 87(2)(b) asks what he was pulled over for. PO Lopez explains that he observed his vehicle parked at a bus stop and that he failed to signal, § 87(2)(b) disagrees, but provides his license after being asked again. At the 1:00 minute mark, § 87(2)(b) says, "Where's the weed, bro?" in apparent response to PO Viera (BR02), whose BWC shows him, at the 46-second mark, telling § 87(2)(b) that they "were smoking weed in the car," which they deny. Immediately after, PO Lopez (BR01) points toward the interior of the driver side door, and says, "There's weed, right here, man... What's that?" § 87(2)(b) holds up a bag of marijuana, and says, "But there's nobody smoking, bro." PO Lopez asks § 87(2)(b) and § 87(2)(b) to exit the vehicle one at a time. § 87(2)(b) repeatedly tells PO Lopez that he said they were smoking weed, which he denied, while PO Lopez reiterates that there is marijuana in the vehicle, despite § 87(2)(b) initially denying there was.

At the 1:50 minute mark (BR01), § 87(2)(b) exits, PO Lopez pats down his exterior, and then escorts him to the rear of the vehicle. § 87(2)(b) and PO Lopez briefly discuss the circumstances that led to the vehicle stop, which § 87(2)(b) disputes. PO Lopez tells § 87(2)(b) that if there is only marijuana in the vehicle, he will only receive a summons and be allowed to leave. After PO Viera pats down § 87(2)(b) he joins § 87(2)(b) at the rear of the vehicle. At the 4:30 minute mark of PO Lopez's BWC (BR01), PO Viera is seen entering the vehicle and conducts a search. At the 6:45 minute mark, after PO Viera completes the vehicle search, PO Lopez tells PO Viera to give him the weed and says it is a "96" (i.e. radio code indicating that a summons is issued). § 87(2)(b) approaches PO Lopez and ask why he is taking his weed. PO Lopez orders § 87(2)(b) and § 87(2)(b) to reenter their vehicle, and once they comply, returns to his RMP, requests additional units, and begins writing the summonses.

At the 10:05 minute mark, PO Lopez says, "Oh, he § 87(2)(b) has a warrant, too." PO Lopez tells PO Viera that he is going to bring § 87(2)(b) and his vehicle back, and asks him to call Sgt. McCarthy. At the 13:00 minute mark, PO Lopez walks back to § 87(2)(b) informs him he has a warrant, which § 87(2)(b) denies. At the 17:00 minute mark, PO Lopez and PO Viera handcuff § 87(2)(b) and at 17:20 minute mark, § 87(2)(b) attempts to throw his keys, which fall to the ground and are picked up by PO Lopez. PO Lopez escorts § 87(2)(b) to the unmarked RMP, they drive away en route to 77th Precinct, with § 87(2)(b) and PO Viera seated in the rear.

No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided. [...] A signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning. NYS Vehicle and Traffic Law, §1163 (BR08).

A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully

possesses marihuana. NYS Penal Law, § 221.05 (BR09).

No person shall operate or drive a motor vehicle upon a public highway of this state or upon any sidewalk or to or from any lot adjacent to a public garage, supermarket, shopping center or car washing establishment or to or from or into a public garage or car washing establishment unless he is duly licensed. NYS Vehicle and Traffic Law, §509 (1) (BR10).

In People v. Coggins, the Court found that an “officer [had] lawfully stopped [a] vehicle, since its driver had been observed committing a traffic violation (see, People v Ellis, 62 NY2d 393; People v Graves, 163 AD2d 487; People v Rodriguez, 160 AD2d 960; People v Harvey, 146 AD2d 585). The officer was equally justified in ordering the driver to step out of the car (see, Michigan v Long, 463 U.S. 1032; People v Robinson, 74 NY2d 773; People v McLaurin, 70 NY2d 779). The officer's seizure of the bag of marihuana which was exposed upon the driver's exit from the car was justified pursuant to the “plain view” exception to the warrant requirement (People v McLaurin, supra; People v Belton, 55 NY2d 49; People v Rose, 125 AD2d 727). The discovery of the marihuana, in turn, justified a full-scale search of the vehicle for additional contraband (Chambers v Maroney, 399 U.S. 42; People v Langen, 60 NY2d 170, cert denied 465 U.S. 1028).” People v. Coggins, 175 A.D.2d 924 (App. Div. 2nd Dept. 1991) (BR11).

§ 87(2)(g)

§ 87(2)(g)

**Allegation D—Abuse of Authority: On September 22, 2019, Sergeant Denis Fitzgerald threatened to arrest** § 87(2)(b)

§ 87(2)(b) stated that following his release on September 22, 2019, he went back to the 77<sup>th</sup> Precinct stationhouse to retrieve his vehicle, wherein he engaged in a verbal dispute with Police Officer Kevin Hernandez of the 77<sup>th</sup> Precinct, over the procedural removal of his vehicle’s fusebox.

§ 87(2)(b) stated (BR03) that after he reconnected the fuse box, his vehicle started, however, the dashboard meters and navigational system did not work. § 87(2)(b) went with PO Hernandez back into the stationhouse, and he asked to speak to a supervisor. § 87(2)(b) stated that Sgt. Fitzgerald came over, and repeated that they were not mechanics, would not fix his vehicle, and told him to leave the stationhouse or he would be arrested again. § 87(2)(b) left the stationhouse and drove away in his vehicle.

PO Hernandez testified (BR12) that § 87(2)(b) was generally upset when he returned his property to him because “almost everything” had removed from his vehicle, but did not recall Sgt. Fitzgerald order § 87(2)(b) to leave the stationhouse, nor recalled Sgt. Fitzgerald threatening to arrest § 87(2)(b) if he refused to leave the stationhouse.

Sgt. Fitzgerald testified (BR13) that while § 87(2)(b) initially had no complaint upon receiving his property, he began to give PO Hernandez “a hard time” about his vehicle’s fuse box being removed, and was “very angry and hostile” toward PO Hernandez because his vehicle had been disabled. Sgt. Fitzgerald could not recall if there were any other civilians in the stationhouse lobby at the time § 87(2)(b) was “giving a hard time” to PO Hernandez. Sgt. Fitzgerald acknowledged speaking directly with § 87(2)(b) wherein he explained to him that he had received all of his property, and had no further reason to remain in the stationhouse.

Sgt. Fitzgerald did not recall ordering § 87(2)(b) to leave the stationhouse, nor recalled if he threatened to arrest § 87(2)(b) for remaining in the stationhouse after he received his property. Sgt. Fitzgerald added that if a person remained in the stationhouse without a legitimate purpose, and was acting disorderly, they could be arrested for trespassing under the penal law.

When necessary to store a vehicle in police custody at the command, remove rotor or coil wire. If unable to remove rotor or coil wire, ensure vehicle is immobilized in another way without causing damage to vehicle. Patrol Guide, Procedure 218-12 (BR14).

A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises. NYS Penal Law, §140.05 (BR15).

In People v. Reape, the court found that an officer communicated a lawful order for an individual to leave the stationhouse when allowing the individual to stay upon the precinct property would interfere with the ordinary use of the property of the Police Department and by other members of the public. People v. Reape, 22 Misc. 3d 615 (Crim Ct. 2008) (BR16)

§ 87(2)(g)

### **Civilian and Officer CCRB Histories**

- § 87(2)(b) has been a party in one prior CCRB complaint.
  - § 87(2)(b)
- PO Lopez, a six-year-member-of-service, has had three prior CCRB complaints filed against him, with a total of six allegations, one of which was substantiated (see Officer History) § 87(2)(g)
  - In CCRB #201703855, an improper summons allegation was substantiated against PO Lopez, the CCRB recommended Command Level Instructions, and the NYPD raised the penalty to formalized training.
- PO Viera, a 12-year-member-of-service, has had 12 prior CCRB complaints filed against him, with a total of 26 allegations, three of which were substantiated (see Officer History) § 87(2)(g)
  - In CCRB #201706371, frisk, vehicle stop, and discourtesy allegations were substantiated against PO Viera, the CCRB recommended charges, and the case is awaiting NYPD disposition.
- PO Hernandez, a one-year-member-of-service, has no prior CCRB complaints filed against him (see Officer History). This is the first CCRB complaint that PO Hernandez has been a party.
- Sgt. Fitzgerald, a seven-year-member-of-service, has had one prior CCRB complaint filed against him, with a total of one allegation, which was not substantiated (see Officer History).

§ 87(2)(g)

### **Mediation, Civil and Criminal Histories**

- § 87(2)(b) rejected mediation in this case.
- On March 11, 2020, a FOIL request was sent to the NYC Comptroller's Office to determine whether § 87(2)(b) has filed a Notice of Claim in regards to this incident, the results of which will be added to the case file upon receipt (BR17).

§ 87(2)(b), § 87(2)(c)

Squad No.: 7

Investigator: \_\_\_\_\_ Griffin Sherbert \_\_\_\_\_ 03/19/2020  
Signature Print Title & Name Date

Squad Leader: \_\_\_\_\_

Signature                      Manager Vanessa Rosen                      03/23/20

Print Title & Name                      Date

Reviewer: \_\_\_\_\_

Signature                      Print Title & Name                      Date